IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.118 OF 2002.

Jagruti K. Thakar : Appellant.

versus

Dhanubhai Thakar & Anr. : Respondents.

Mr.H.V.Gala i/by M/s.H.G.Gala & Co. for the appellants.

Mr.N.Y.Gupte for Respondent No.1.

CORAM : D.G.DESHPANDE,J.

DATED : 15th March 2005.

JUDGMENT :-

1. Heard advocate Mr.Gala for the appellant and advocate Mr.Gupte for the Respondent No.1. This appeal is filed by the original defendant No.1 against the judgment and decree passed by the City Civil Court dated 24th April 2001.

2. I will refer to the parties as the plaintiff and defendant. Because appellant is the original defendant No.1 and Respondent No.1 is the original plaintiff.

3. The plaintiff filed the suit against defendant No.1 who is his daughter-in-law and also against his son Ketan, who was the husband of defendant No.1 Jagruti. It was the suit for mandatory injunction directing defendant No.1 to remove herself from Flat No.B-8, Mayuri Apartments, R.H.B. Road, Mulund (West), Mumbai and further preventing her from entering or otherwise residing in the said flat and Ashirwad, 26/1, Powai Chowk, Mulund Colony, Mulund (West), Mumbai. It was the case of the plaintiff that he was exclusive owner of the flat in Mayuri Apartments. His son married to defendant No.1 Jagruti. She had a degree of B.D.S. to her credit and she was practising as a Dentist prior to marriage. The marriage was solemnised on 5.5.1992 and, thereafter defendant No.1 Jagruti started staying with Ketan in Mayuri Apartments. In 1991 the plaintiff had purchased barracks bearing No.26/1, Powai Chowk, Mulund Colony,

Mulund (West). However, in the place of barracks, he constructed a bungalow as Ashirwad. According to the plaintiff, defendant No.1 Jagruti started demanding a separate residence soon after the marriage and also started pressurising her husband for the same. On account of this, the relationship between the parties got polluted. Defendant No.1 Jagruti filed false complaint against the plaintiff, his wife, his son and daughter. The plaintiff's daughter Archana got married in 1994. But when she came to maiden home for her first delivery, defendant No.1-Jagruti did not like her presence in the family and, therefore, Archana was harassed by Jagruti. As a result, ultimately, defendant No.2 purchased a small flat at Thane in Shramik Housing Society and shifted there from Mayuri Apartments i.e. the suit premises. Thereafter son Ketan filed a petition for restitution of conjugal rights in 1996 in the Family Court at Bandra. The plaintiff had suffered a cardiac problem due to the behaviour of defendant No.1 Jagruti. Phalguni - the another daughter of the plaintiff was assaulted by defendant No.1 Jagruti. There were complaints and counter complaints. And, therefore,

ultimately the plaintiff was required to file this suit for the relief referred to above.

4. Defendant No.1 - Jagruti resisted the claim of the plaintiff. Defendant No.2 - the Son Ketan did not file any written statement nor he contested the suit. Defendant No.1 Jagruti raised two contentions in order to protect her possession or residency right in Mayuri Apartments. Firstly, according to her, she entered into marriage with Ketan even though Ketan was 10th standard student and, even though she was elder to him by nine months only because of the assurance of the plaintiff about her financial security. According to her, further, the plaintiff had promised before marriage that if defendant No.1 would marry to defendant No.2 then the plaintiff would transfer Flat No.B-8, at Mayuri Apartments i.e. the suit flat in her name. Therefore, defendant No.1 Jagruti is firstly relying upon the oral agreement between her and the plaintiff.

5. Secondly, according to defendant No.1 Jagruti, Mayuri Apartments is her matrimonial home. Because according to her, the plaintiff

and his brothers formed HUF and they have HUF business and that the suit flat and Ashirwad Bungalow are the HUF properties where she had a right to reside. The trial Court on the aforesaid facts framed following Issues :-

1. Does Plaintiff prove that he is the sole owner of the suit flat and suit bungalow and defendant Nos. 1 and 2 are residing with him a a family members of the plaintiff ?

2. Does defendant No.1 prove that she has any right to stay in the suit flat and suit bungalow ?

3. Does the plaintiff prove that the plaintiff is entitled to the permanent injunction against the defendants as prayed ?

4. What order ?

6. The plaintiff has examined himself alone and defendant No.1 - Jagruti examined herself alone. They also filed certain documents and

proved them. And, thereafter considering the case of both the sides, the trial Court gave findings in favour of the plaintiff and decreed the suit and, therefore, this appeal by defendant No.1 - Jagruti.

7. Mr.Gala for the appellant - Jagruti strenuously urged that there was sufficient material on record to hold that both these properties i.e. the flat in Mayuri Apartments and Ashirwad Bungalow were of the HUF properties and the flat in Mayuri Apartments was the marital residence of the appellant - Jagruti. He also contended that the plaintiff was a rich person and all his sons are well settled, so also the parents of the appellant were rich and, therefore, this was a marriage between equals. He contended that as a member of joint family, defendant No.1 - Jagruti had a residency right in Mayuri Apartments and she could not be ousted as she was joint owner of the property.

8. Secondly, Mr.Gala for the appellant contended that defendant No.1 has succeeded in proving the oral agreement between herself and the plaintiff which took place prior to marriage

and as per which the plaintiff had promised defendant No.1 to give her flat No.B-8 in Mayuri Apartments if she marries defendant No.2 Ketan. Therefore, on both the counts i.e. as being a member of the joint family and joint owner, defendant No.1 was entitled to protection from the court and, secondly on the basis of oral agreement also she was entitled for protection. According to him, the trial Court did not appreciate the evidence in proper perspective and came to a wrong conclusion and finding and, therefore, the suit of the plaintiff was liable to be dismissed.

9. Mr.Gala also contended that there was no substance or force in the contention of the plaintiff that the house i.e. a small flat at Thane in Shramik Housing Society was or could be the matrimonial home of defendant No.1. According to him, this flat was built for labourers and looking to the financial status of defendant No.2 - Ketan and the plaintiff, this flat which purchased by the plaintiff could never be her matrimonial home. He contended that this flat was purchased to deprive defendant No.1 of her right in the suit property.

10. Mr.Gala further drew my attention to certain part of the evidence of plaintiff and of the defendant in support of his contention and relied upon Summary of Submissions filed by him before the City Civil Court.

. It has to be noted at this juncture and at this place that in the Summary of Submissions running from page Nos. 205 to 250 at least four pages i.e. page Nos. 247 to 250 are devoted to the case laws and, none of which was brought to my notice by giving copies of those case laws. Whereas Mr.Gupte, appearing for the plaintiff, gave citations and authorities with copies of the relevant judgments for perusal. It is altogether different, whether a particular authority applies to the facts of the case or not, but it was necessary to give ruling in proper manner to the Court. Even though, the Summary of Submissions is running into 45 pages, the question involved in this case is very short and, that is, as per the Issues framed by the trial Court i.e. whether the plaintiff proves that the flat in Mayuri Apartments and Ashirwad Bungalow were his individual properties or, whether defendant No.1

- Jagruti proves that they are the properties of HUF or joint properties so as to enable her to claim joint ownership in the said properties along with her husband or through her husband and; secondly defendant No.1 - Jagruti proves oral agreement.

11. So far as oral agreement is concerned, the case of defendant No.1 - Jagruti in the written statement is as under :-

. Defendant No.1 has contended that when the proposal for Ketan’s marriage came to her, there were meetings between the parties and the question of her security was primarily considered. The representations were made by the plaintiff and defendant No.2 and assurances were given that defendant No.1 would be allowed to continue with her profession and for which all required assistance, arrangement and help would be given to defendant No.1 and, further more the suit premises would be transferred to her name soon after the marriage and it’s ceremonies were over. She, therefore, accepted this proposal that if defendant No.1 marries defendant No.2,

the plaintiff would transfer the flat in her name.

12. It is very interesting to know that though defendant No.1 pleads such an agreement, which is before marriage between the parties, she does not get any support in that regard either from her parents or any of her relatives. She has no-where stated in her written statement as to when actually such an agreement took place between the parties; what was the date of the agreement; who were present at the time of agreement and; why her parents were not present at the time of agreement. She does not state anywhere in the written statement that her parents were present and she has not examined any of her relatives either her parents, brother or anybody closed to her to prove the said agreement. Therefore, firstly, there is no corroboration to her testimony about the oral agreement between the parties in this regard.

13. Mr.Gala, for defendant No.1, tried to contend that defendant No.1 was a dentist by profession before her marriage; whereas defendant No.2 was 10th class passed young boy;

that defendant No.1 was elder in age by nine months to defendant No.2 and, therefore, because of her qualification she was interested in her financial security and, therefore, the plaintiff agreed to transfer the flat in Mayuri Apartments in her name after the marriage.

. If merely this was a case, then this argument has two aspects. This argument, though attractive, carries some hidden meaning in it and, the meaning is, defendant No.1 was more interested in the properties of the plaintiff than defendant No.2 - Ketan. It can also mean that she married Ketan only because of the wealth and rich of the family. If that is so, then obviously, this was a very sound reason for the subsequent harmony between herself and her husband and their marital relationship. In any case, the court has to decide the matter on the basis of the pleadings and evidence and, so far as the evidence to oral agreement is concerned, firstly the pleadings are vague and, secondly, there is no corroboration.

14. It is the evidence of oath against oath and in the circumstances, the trial Court rightly

gave findings against defendant No.1 - Jagruti that she has failed to prove her agreement, the burden of which was naturally upon her. Against this, i.e. about this case of defendant No.1 about the oral agreement, Mr.Gupte, appearing for the plaintiff/respondent, pointed out that in her written statement in the family Court and her reply to the notice, Exhibit C and Exhibit 2 respectively, defendant No.1 has not uttered a single word about such an agreement between the parties. If there was any such oral contract, as alleged by defendant no.1 now in this suit, then, according to Mr.Gupte, the said would have found place in her written statement and in her reply notice. Because it was the first opportunity to defendant No.1 to come up with her defences. Admittedly, there is no whisper about any such oral contract and, therefore, the trial Court rightly came to the conclusion against defendant No.1 in that regard. The trial Court rightly held that at the time of marriage defendant No.1 was practising as a Dentist in Vapi, she was matured enough to take her own decisions; nobody had forced her to accept this proposal of marriage and since the marriage is a solemn relationship, it cannot be based on such contract

of transferring the flat by the father of Ketan in the name of defendant No.1 - Jagruti. The trial Court rightly held that the mere words of defendant No.1 cannot be considered as a proof of oral contract and defendant No.1 has miserably failed to prove her case of oral contract. It is clear that defendant No.1 has miserably failed to prove her contract or agreement with the plaintiff. Therefore, her case on that count was rightly rejected by the trial court and, has to be rejected by this Court.

15. The second contention of defendant No.1 was that the suit house was the property of HUF and that she had a right to reside in it as a joint owner. There is also no substance in this contention. Admittedly, the property stands in the name of the plaintiff. Initially it was in the name of the plaintiff’s wife and his brother’s wife. But subsequently it came to be transferred in his name and his wife’s name. No evidence has been brought on record by the defendant No.1 in support of her contention that the plaintiff-father had some ancestral property and from that ancestral property the suit property came to be purchased or built. When the

burden in that regard was on the defendant No.1, it was obligatory upon her to discharge the burden by producing sufficient evidence on record. She remained contending by not filing documents in that regard and now an attempt is being made on her behalf to find support to her case from the evidence of the plaintiff, though, this is permissible, the so called admissions relied upon by the appellant/defendant No.1 are not at all sufficient to come to the conclusion in favour of the appellant/defendant No.1.

16. The plaintiff has stated in his evidence that they were four brothers and they were having joint business; that before partition the brothers had joint income and joint expenditure for the family. From this admission, the appellant/defendant NO.1 wants to contend that inference of joint family property should be drawn and she should be given benefit of such inference. I do not find any merit in this submission. Merely the brothers were running a business jointly, it does not mean that there was any joint family property. What was the nature of the joint business; what was the contribution

of each brother in the joint business and, from where they raised that contribution are all points raised untouched by the defendant No.1 in the cross examination of the plaintiff. No inference about existence of joint family or joint family business or joint family property can be drawn on the basis of three admissions given by the plaintiff. No inference, therefore, can be drawn that the suit property was the joint family property wherein Ketan had a right by birth and, if, therefore, Ketan had no right in the property of his father, his wife cannot have nor she could claim any right in the property.

17. Mr.Gala tried to contend that the over all effect of the so called admissions given by the plaintiff is to indicate that the case of the plaintiff about exclusive ownership was not true and genuine.

. I am not in agreement with this submission. Firstly the property stands in the name of the plaintiff. Nothing has been brought on record to show that the funds for the property were made available to the plaintiff from any joint family property or joint family earnings.

Doing the business jointly by the brothers does not mean, nor does it indicate existence of joint family or as rightly argued by Mr.Gupte HUF was a creation or recognition by statute for the purpose of Income Tax Act and nothing more. The questions whether defendant No.1 harassed the plaintiff or, the plaintiff harassed defendant No.1, are not the questions material to the case of the plaintiff. If plaintiff is the owner of the property and, if his son defendant No.2 had no right in the suit property, the wife of defendant No.2 i.e. the present appellant cannot claim any right in the property. The matter is as simple as that. Therefore, this is a case where the appellant has neither been able to prove her agreement nor has been able to prove that the property was the joint family property. The trial Court, with all sympathy to the defendant No.1, rightly concluded that she has no right in respect of the property and rightly decreed the suit of the plaintiff.

18. It was also contended by Mr.Gala for defendant No.1 that injunction is a discretionery relief and, if the injunction was putting defendant No.1 to hardship and was oppressive

against her, injunction ought not to be granted. This is not a case where discretion has to be exercised in favour of defendant No.1. The relations between the parties have gone beyond repairs and defendant No.1 cannot be foisted upon the plaintiff if the plaintiff does not desire to continue with the said relationship. The case laws referred to by Mr.Gala in his Summary of Submissions filed before the City Civil Court is not required to be considered. Because there is absolutely nothing to hold even remotely that there was any joint family status between the plaintiff and his brothers or any joint family property at any time. Mr.Gupte has rightly relied upon judgement of this Court reported in **AIR 1995 Bom. 210 [Conard Dias vs. Joseph Dias]** wherein it is held that a person who is residing with the parents in the house cannot claim any legal character much less, the character of a licensee as defined in Section 52, but he is residing simpliciter as a member of the family and nothing more and nothing less.

19. Therefore, for all these reasons I pass the following order :-

:ORDER:

The Appeal is dismissed.

But in the circumstances, no order as to costs.

Certified copy expedited.

[D.G.DESHPANDE]
JUDGE.

15/03/2005

After this order was pronounced Mr.Gala, appearing for the appellant, prays for staying the operation of this order on the ground that there is stay granted for a long time. In the circumstances of the case, the prayer for staying the operation of this order cannot be granted. Hence prayer is rejected.

[D.G.DESHPANDE]
JUDGE.

15/03/2005